

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JANUARY 20, 1998

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**Nos. 97-0415-FT
97-1179-FT**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

KENNETH M. NEIMAN,

PLAINTIFF-APPELLANT,

V.

**DAVID L. LARSON, THOMAS E. KINNEY, MEDICAL
COLLEGE OF WISCONSIN AND PHYSICIANS MUTUAL
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and an order of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Kenneth M. Neiman appeals from circuit court judgments dismissing his second amended complaint and awarding David L. Larson, M.D., Thomas E. Kinney, M.D., Medical College of Wisconsin and

Physicians Mutual Insurance Company (the defendants) attorney's fees and costs in the amount of \$4,404.46. Neiman also appeals from a subsequent circuit court order denying his motion to vacate that part of the judgment awarding attorney's fees and granting the defendants \$50 in statutory motion costs. Neiman argues that the circuit court's dismissal of his lawsuit and motion to vacate as well as the circuit court's award of actual attorney's fees and statutory motion costs all resulted from the trial court's erroneous exercise of discretion.¹ Pursuant to this court's order dated May 21, 1997, this case was submitted to the court on the expedited appeals calendar. Upon review of the briefs and the record, we affirm the circuit court's judgments and order.

1. BACKGROUND

Neiman, acting *pro se*, initiated this case in July 1995 when he filed a complaint against Dr. Larson. Neiman alleged that Dr. Larson was negligent in his performance of cosmetic surgery on him and that Dr. Larson "botched" an attempt to "remedy" the results of the original surgery. Neiman sought \$4,000.00 in "damages" and "anticipated damages" to correct Dr. Larson's "sloppy work." Dr. Larson denied liability. The trial court ordered Neiman to submit the case to mediation with the Medical Malpractice Mediation Panel under § 655.445, STATS.

Mediation was scheduled for April 1996. As the scheduled mediation approached, Neiman indicated that he was no longer interested in pursuing mediation but rather wanted to commence discovery. Neiman also moved the trial court for leave to file an amended complaint. The proposed

¹ These appeals were consolidated for disposition pursuant to our order entered June 9, 1997.

amendments added the Medical College of Wisconsin and Dr. Kinney as defendants, added claims of fraud and intentional tort, increased Neiman's claim of compensatory damages to \$10,000.00, and requested \$30,000.00 in punitive damages. At this time, Attorney Erwin B. Neiman (Attorney Neiman), the plaintiff's father, filed a notice of appearance on his son's behalf "for limited purposes[.]"

After a second attempt at mediation failed, the case returned to the circuit court and Dr. Larson filed a motion for summary judgment with respect to Neiman's claim of the intentional infliction of emotional harm alleged in count three of his first amended complaint. The trial court granted the motion. The trial court also granted defense motions requesting that Neiman post security for costs, issued a protective order regarding the location of depositions, and granted Neiman's motion to amend count three of his first amended complaint to allege the negligent infliction of emotional harm. The trial court denied Dr. Kinney's motion for summary judgment. During this time period, Attorney Neiman filed a statement indicating that he was representing his son for all purposes in the lawsuit.

On October 21, 1996, Neiman served and filed his second amended complaint. The amendments did not comply with the court's order limiting any amendment to count three of the first amended complaint. Instead, the second amended complaint added a defendant and alleged five counts. The body of the complaint grew from twenty-eight paragraphs to forty-two paragraphs. Despite being repeatedly served written notice of Attorney Neiman's duty under

§ 802.05(1)(a), STATS.,² to sign a pleading, motion or other paper, Attorney Neiman did not sign the second amended complaint. It was further undisputed that a number of other documents subject to § 802.05(1)(a) were served and filed without Attorney Neiman's signature during the course of this case before the circuit court.

On November 5, 1996, the defendants moved the trial court to dismiss the second amended complaint. The motion was premised on two grounds: (1) that the second amended complaint violated § 802.05(1)(a), STATS., since it was not signed by counsel; and (2) that the second amended complaint violated the trial court's order and, hence, § 802.09(1), STATS.³ The defendants also requested an extension of time in which to file an answer.

These motions were heard by the trial court on December 16, 1996. The trial court entered a judgment on January 9, 1997, granting the defendants' motion to dismiss. The trial court concluded both that the filing of the second amended complaint without the signature of counsel of record violated § 802.05(1)(a), STATS., and that Neiman's wholesale revision of his first amended complaint violated the trial court's order permitting a second amendment. The trial court further concluded that these violations justified dismissal pursuant to

² **802.05 Signing of pleadings, motions and other papers; sanctions.** (1) (a) Every pleading, motion or other paper of a party represented by an attorney shall contain the name, state bar number, if any, telephone number, and address of the attorney and the name of the attorney's law firm, if any, and shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name.... If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant....

³ **802.09 Amended and supplemental pleadings.** (1) AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court

§ 805.03, STATS.⁴ The trial court then granted the defendants their actual attorney's fees and costs incurred as a result of the filing of the second amended complaint. The trial court directed the defendants to submit an order particularizing those fees and cost. The trial court stated it would sign the proposed order unless Neiman objected under the five-day rule contained in the Rules for the First Judicial District (RFJD).⁵

The defendants filed a proposed order on February 3, 1997. On February 7, 1997, Neiman faxed a "Notice of Motion" stating that a motion would follow shortly requesting the trial court "to disallow" attorney's fees and costs to these defendants. Nevertheless, Neiman did not file a motion within five days of the filing of the proposed order. The trial court entered the order submitted by the defendants, awarding a total of \$4,404.46 in costs and fees.

On February 28, 1997, Neiman filed a motion to vacate judgment and a motion in opposition to the defendants' claim to fees. The trial court entered

⁴ **805.03 Failure to prosecute or comply with procedure statutes.** For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

⁵ RULES FOR THE FIRST JUD. DIST. 323(b) provides as follows:

Prior to the submission of any document to the court for signature, a copy shall be served upon all counsel of record and/or parties not represented by counsel of record, with a cover letter stating that the document is being submitted to the court and that objections, if any, shall be filed with the court and a copy served on all counsel of record and/or parties not appearing by counsel of record within five business days after receipt.

judgment in favor of the defendants on March 11, 1997. Six days later, the trial court held a hearing on Neiman's motions and denied them. This appeal followed.

2. DISCUSSION

The trial court has both statutory authority and inherent authority to sanction a party for failing to comply with procedural rules and for failing to obey court orders. See § 805.03, STATS.; *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273-74, 470 N.W.2d 859, 863 (1991). Where the noncomplying party's conduct is egregious and without "clear and justifiable excuse," the court may order dismissal as a sanction. *Johnson*, 162 Wis.2d at 276-77, 470 N.W.2d at 865. We review a trial court's decision to dismiss for an erroneous exercise of discretion. "A court properly exercises its discretion if it examines relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach." *Kerans v. Manion Outdoors Co.*, 167 Wis.2d 122, 130, 482 N.W.2d 110, 113 (Ct. App. 1992).

The trial court's dismissal of Neiman's second amended complaint rested in part on the undisputed record that Attorney Neiman failed to comply with § 802.05(1)(a), STATS., despite being informed repeatedly of the statute's terms. Section 802.05(1)(a) provides in part that "[i]f a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." Here, Attorney Neiman did not offer to sign the second amended complaint or other documents even after the omission was pointed out. The trial court's decision also rested on the undisputed record of Neiman's wide-ranging revision of his first amended complaint, a revision violating the express terms of the circuit court's order limiting any amendment to count three of the first amended complaint.

As the trial court properly concluded, a party's decision to ignore a compulsory procedural statute and the trial court's order is "egregious" conduct. Section 802.05(1)(a), STATS., demands compliance by its own terms. Court orders should either be complied with or challenged, but they may not be ignored. Furthermore, Neiman failed to advise the court of any "clear and justifiable excuse" for his egregious conduct, a showing necessary to avoid the court's dismissal power. See *Trispel v. Haefer*, 89 Wis.2d 725, 733, 279 N.W.2d 242, 245 (1979).

We conclude further that the trial court's award of attorney's fees with respect to the defendants' response to the filing of the second amended complaint was well within the trial court's discretion under § 802.05(1)(a), STATS. Section 802.05(1)(a) permits the award of reasonable expenses, including reasonable attorney's fees incurred due to the filing of a pleading, motion or other paper violating its terms. Furthermore, Neiman did not file an objection to the proposed order awarding the defendants their fees within the five-day rule.⁶

The trial court construed Neiman's February 28 motions as objections to the proposed order and denied them as untimely.⁷ The trial court's determination that these motions were filed well outside the five-day rule is indisputable. Accordingly, the trial court's award of \$50 motion costs to the

⁶ Although Neiman's February 7, 1997, notice of motion, was timely faxed to the trial court, it nevertheless violated the plain direction of RFJD § 323(b), by failing to specify Neiman's objections or asserting cause for the trial court to delay entering the defendants' proposed order.

⁷ Upon review of the motions, this court cannot conclude that the trial court's characterization of these motions was improper. Although the caption of Neiman's motion to vacate suggests that it was brought pursuant to § 806.07, STATS., the text of both motions was aimed at challenging the award of attorney's fees.

defendants was justified. *See Mooney v. Royal Ins. Co.*, 164 Wis.2d 516, 524, 476 N.W.2d 287, 290 (Ct. App. 1991).

We conclude that the undisputed record provides an ample basis for the trial court's judgments and order in this case. *See State v. Pharr*, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983). Accordingly, although in some respects the trial court failed to set forth its reasoning in exercising its discretion, we nevertheless affirm the trial court's discretionary decisions. *See id.*

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

